INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Burke, Edward & John, Ltd. v. *United States*, 26 C. C. P. A. 374, certiorari denied, 308 U. S. 564	4
Cole & Co., Geo. W. v. *United States*, 107 F. (2d) 815, 27 C. C. P. A. 201	5
Hampton & Co. v. *United States*, 276 U. S. 394	5
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	5
Von Damm v. *United States*, 90 F. (2d) 263, 25 C. C. P. A. 97, certiorari denied, 302 U. S. 722	4
Wolf, Louis & Co. v. *United States*, 107 F. (2d) 819, 27 C. C. P. A. 188	4
Statutes:	
Convention of Commercial Reciprocity between the United States and Cuba of 1902, 33 Stat. 2136:	
Art. II	10
Art. VIII	10
Judicial Code, sec. 195 (U. S. C., title 28, sec. 308)	
Reciprocal Trade Agreement Act of June 12, 1934, 48 Stat. 943, sec. 350 (a) (b) (c)	5, 7, 9
Tariff Act of 1930:	
Par. 724	7
Sec. 316	7
Trade Agreement—Cuba (49 Stat. 3559):	
Art. III	12
Art. XVI	13
Treaty entered into between the United States and the Argentine Confederation, dated July 27, 1853, ratified April 9, 1855 (10 Stat. 1005):	
Art. III	14
Art. IV	14

317181—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1001

ERNEST E. MARKS CO., A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court (R. 12) is reported in Treasury Decisions, Vol. 75, advance sheets No. 40 (March 21, 1940), p. 15. The opinion of the United States Court of Customs and Patent Appeals (R. 27) is reported in 117 F. (2d) 542, and in Treasury Decisions, Vol. 76, advance sheets No. 34 (February 20, 1941), p. 40.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on February 3, 1941 (R. 36). The petition for a writ

of certiorari was filed on April 29, 1941. The jurisdiction of this Court is invoked under section 195 of the Judicial Code, as amended (U. S. C., Title 28, Sec. 308).

QUESTIONS PRESENTED

Whether certain reductions in tariff rates granted to Cuba in the trade agreement entered into between the United States and the Republic of Cuba on August 24, 1934, *infra,* p. 11, pursuant to the authority granted to the President by the Trade Agreement Act of June 12, 1934 (section 350 of the Tariff Act of 1930, as amended), are automatically extended to all nondiscriminating countries, including Argentina, and whether corn imported from Argentina is subject to duty, as assessed by the collector, at the rate of 25 cents per bushel of 56 pounds, as provided for under paragraph 724 of the Tariff Act of 1930, *infra,* p. 7, or at the rate of 10 cents per bushel of 56 pounds or other lower rate claimed under the provisions of the Cuban Trade Agreement, *supra,* and the treaty with Argentina, *infra,* p. 14.

STATUTES INVOLVED

The pertinent parts of the statutes, treaties, and agreement involved are set forth in an Appendix, *infra,* pp. 7–14.

STATEMENT

The Trade Agreement Act of June 12, 1934, 48 Stat. 943 (Appendix, *infra,* pp. 7–9), authorizes the President to enter into trade agreements with for-

eign countries and to proclaim such modifications of existing duties, subject to certain limitations, as are required or appropriate to carry out any foreign trade agreement entered into. The Act also contains a so-called "generalization clause" which provides, in substance, that the proclaimed duties and other import restrictions shall apply to all articles the growth, produce, or manufacture of all nondiscriminating foreign countries. The Act further provides that nothing therein shall prevent the President from making an exclusive agreement with Cuba modifying the existing preferential customs treatment of any article the growth, produce, or manufacture of Cuba. Acting under the authority of the Act, the President, on August 24, 1934, entered into an agreement with the Republic of Cuba (49 Stat. 3559, *infra,* pp. 11–13) wherein the minimum preferential reduction to Cuba on corn was fixed at 20 per centum and the maximum rate of duty on corn was fixed at 10 cents per bushel of 56 pounds.

Thereafter the petitioner, in 1936, imported into the United States certain corn from Argentina which was assessed for duty by the collector of customs at 25 cents per bushel of 56 pounds under the provisions of paragraph 724 of the Tariff Act of 1930, *infra,* p. 7. The petitioner filed a protest claiming that the assessment of duties made herein was illegal and void and that the corn in question was properly dutiable at 10

cents per bushel of 56 pounds, or at various other rates, by virtue of the generalization clause contained in the Trade Agreement Act of June 12, 1934, the trade agreement subsequently entered into between the United States and Cuba, and the Argentine Treaty of 1853, *infra*, p. 14.

The United States Customs Court sustained the action of the collector (R. 12–26), and on appeal the United States Court of Customs and Patent Appeals unanimously affirmed the judgment of the Customs Court (R. 27–36), holding that the Trade Agreement Act authorized the President to make an exclusive agreement with Cuba; that the agreement entered into with Cuba pursuant thereto was an exclusive agreement and that therefore the reductions therein granted to Cuba did not extend to Argentina, or to any other nondiscriminating country, under the generalization clause contained in said Act, or by reason of the conditional most-favored-nation clause contained in the Argentine Treaty of 1853.

ARGUMENT

The basic issues here involved have previously been adjudicated by the court below contrary to petitioner's position, and this Court has denied certiorari. *Von Damm* v. *United States,* 90 F. (2d) 263, 25 C. C. P. A. 97, certiorari denied, 302 U. S. 722; *Edward & John Burke, Ltd.,* v. *United States,* 26 C. C. P. A. 374, certiorari denied, 308 U. S. 564. See also *Louis Wolf & Co.*

v. *United States,* 107 F. (2d) 819, 27 C. C. P. A. 188; *Geo. W. Cole & Co.* v. *United States,* 107 F. (2d) 815, 27 C. C. P. A. 201. Moreover, the decision below is plainly correct, and there is no occasion for further review.

Section 350 (a) of the Trade Agreement Act authorizes the President to enter into trade agreements with foreign countries, subject to specified limitations, and provides, in substance, that the duties proclaimed in pursuance of any such agreement shall extend to all nondiscriminating countries. Subsection (b), however, expressly permits Cuba to be excepted from the sweeping provisions of (a), and shows that Congress intended to authorize the President to make an *exclusive* agreement with Cuba the benefits of which would not extend to any other country. These provisions were simply in furtherance of our national policy of according preferential treatment to Cuba, a policy which was established by the Cuban Convention of 1902, and continued by Congress in Section 316 of the Tariff Act of 1930.

Petitioner in this case makes the further contention that if subsection (b) be construed to authorize an exclusive agreement with Cuba it is an unconstitutional delegation of legislative power to the President. But the broad provisions of subsection (a) themselves are plainly valid (cf. *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304; *Hampton & Co.* v. *United States,*

276 U. S. 394), and subsection (b) is simply a limitation upon the provisions of subsection (a). The authority to enter into trade agreements is conferred by subsection (a) which provides further that the rates shall be generalized to other countries, thus impliedly forbidding an exclusive agreement. Subsection (b) then provides in effect that the generalization clause shall not preclude an exclusive agreement with Cuba. It is difficult to see how the provisions of subsections (a) and (b), taken together, afford any less definite standard than the provisions of subsection (a) standing alone, which petitioner does not appear to challenge.

CONCLUSION

The decision below is correct and this Court has already declined to review the main questions presented. There are no conflicts. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

CHARLES D. LAWRENCE,
Acting Assistant Attorney General.

CHARLES J. MIVILLE,
Special Attorney.

JOHN R. BENNEY, *Attorney.*

MAY 1941.